Starcon, Inc. *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO. Case 13–CA–32719

June 30, 2005

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This case, which involves refusal-to-hire and refusal-to-consider issues in a "salting" context, is before the Board following a remand from the United States Court of Appeals for the Seventh Circuit. *Starcon, Inc. v. NLRB*, 176 F.3d 948 (1999).

On June 13, 1997, the Board issued a Decision and Order in this proceeding,[1] in which it found that the Respondent committed several violations of Section 8(a)(1); engaged in unlawful discriminatory treatment of certain of its employees; unlawfully subcontracted work in order to avoid hiring prounion job applicants; unlawfully changed its hiring policies for the same reason; and unlawfully refused to hire 111 prounion applicants. Following then-current precedent, the Board left to compliance the question of the number of job vacancies that were actually available to the group of discriminatees whom the Board found were unlawfully refused employment.

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the Seventh Circuit, and the Board filed a cross-application for enforcement of its Order. On May 4, 1999, the court issued its opinion granting the Board's Order in part, denying it in part, and remanding to the Board.[2] The court enforced most of the Board's Order, but denied enforcement with respect to the Board's instatement remedy. The court, in particular, criticized the Board's failure to identify, at the unfair-labor-practice stage of this proceeding, the number of vacancies that were available during the relevant period, which resulted in the Board's failure to establish the number of alleged discriminatees actually entitled to instatement and backpay. As a result, the court held that the Board cannot order an affirmative remedy for a job applicant who is an alleged discriminatee without establishing, prior to issuing its order, that the applicant suffered a concrete injury, i.e., denial of a position.[3] The court remanded the case to the Board for further consideration and "for the entry of a new order that will be consistent with the principles laid down in this opinion."[4]

Following the court's remand, the Board invited the parties to file statements of position regarding the issues raised by the court's opinion. Thereafter, the General Counsel, the Charging Party Union, and the Respondent all filed statements of position with the Board, and the Respondent and the Union subsequently filed responses to the General Counsel's statement of position.

By unpublished Order dated June 7, 2000, the Board remanded this proceeding to an administrative law judge for consideration of the issues raised by the court's remand, including, if necessary, a reopening of the record. The Board instructed that the judge's findings must be consistent with the law of the case established by the court, and with *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002), a case that issued after the court's opinion in this case and that sets forth the evidentiary framework for proof of refusal-to-hire and refusal-to-consider violations, and the remedies for these violations.

On June 27, 2001, Administrative Law Judge William G. Kocol issued the attached supplemental decision. The General Counsel, the Respondent, and the Union filed exceptions and supporting briefs.[5]

The Board has considered the judge's Supplemental Decision and the record in light of the court's opinion and the parties' exceptions and briefs, and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order.

I.

As detailed in his Supplemental Decision, the judge first determined that there were 107 alleged discriminatees entitled to consideration for instatement and backpay. He further found that there were 76 job vacancies during the relevant period, including both full-time and temporary positions. Pursuant to the *FES* analytical framework,[6] he then made findings concerning the quali-

[1] 323 NLRB 977 (1997).

[2] 176 F.3d 948.

[3] 176 F.3d at 950–952.

[4] 176 F.3d at 952.

[5] In addition, the General Counsel and the Union each filed briefs opposing the Respondent's exceptions; the Respondent filed a brief in support of the judge's supplemental decision, briefs opposing the General Counsel's and the Union's exceptions, and reply briefs to the General Counsel's and the Union's briefs opposing its exceptions; and the Union filed a reply brief to the Respondent's brief opposing the Union's exceptions.

[6] Under *FES*, to establish a discriminatory refusal to hire, the General Counsel must first show: (1) that the respondent was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced

fications of the alleged discriminatees with respect to the three positions in which Respondent had vacancies: welder, mechanic, and laborer. He noted that the Respondent conceded that the two alleged discriminatees who actually testified at the trial, Eugene Forkin and Robert Behrends, were entitled to an affirmative remedy. As to the remaining 105 alleged discriminatees who did not testify, the judge found that the General Counsel had failed to show that they were available for and willing to accept employment at the times the Respondent's vacancies occurred. Therefore, in the judge's view, it was consistent with both the court's opinion and *FES* to find that an unlawful refusal to hire had not been proven regarding any of these individuals. Accordingly, he recommended that they be denied instatement and backpay.

In addition, the judge addressed the refusal-to-consider theory set forth in *FES*. Although he found that the Respondent had violated the Act in this regard, he concluded that the only remedy available under the *FES* theory was a cease-and-desist order, in light of the limits of the court's remand order and the passage of time following the commission of this unfair labor practice. Finally, he recommended instatement and backpay for Forkin and Behrends on condition that, before being hired as welders, they pass a pipe-welding test required by the Respondent of its welder applicants.

II.

We will affirm the supplemental decision only to the extent consistent with our analyses below.

A. The judge concluded that only Forkin and Behrends, who testified at the hearing, were entitled to instatement and backpay. He found that Forkin was qualified as a welder, mechanic, and laborer, and that Behrends was qualified as a welder and laborer. We agree. We further affirm that, under the law of the case, the failure of the General Counsel to prove that the remaining alleged discriminatees were available for and willing to accept a job offer from the Respondent when vacancies occurred precluded an affirmative remedy for them.[7] In our view, the judge's analysis is dictated by the court's opinion. Accordingly, we find it unnecessary to decide whether the same result would follow independently from the application of *FES*.[8]

The Respondent asserts two challenges to the judge's instatement and backpay remedies involving Behrends and Forkin. The first challenge involves *Dean General Contractors*, 285 NLRB 573 (1987), and the second involves the pipe-welding test that the Respondent required welder applicants to pass.

We agree with the judge that the remedial issues addressed in *Dean General* are appropriately left to the compliance stage of this proceeding.[9] We reject the Respondent's contention that this determination is inconsistent with the court's opinion. The court was concerned that the record did not establish that there were discriminatees who were available for work at times when vacancies occurred. Pursuant to the remand, we have identified two such discriminatees. By contrast, we leave for compliance the additional issue of the length of time each of the discriminatees would have worked for the Respondent if he had been hired for that vacancy.

With regard to the pipe-welding test, the judge found that, although it was the General Counsel's burden under *FES* to prove that alleged discriminatees who applied for welder positions could pass the test, the Respondent's discrimination prevented them from actually taking the test at the time they applied. The judge concluded accordingly that, in compliance, Behrends and Forkin, who were otherwise qualified as welders, must establish that they were capable of passing the same test that the Respondent had given to other applicants, in order to merit instatement as welders. We agree with the judge, in the circumstances of this case,[10] that the two discriminatees

or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. If the respondent asserts that the applicants were not qualified for the positions it was filling, it is the respondent's burden to show, at the hearing on the merits, that they did not possess the specific qualifications the position required or that others (who were hired) had superior qualifications, and that it would not have hired them for that reason even in the absence of their union support or activity. 331 NLRB at 12.

[7] Therefore, we adopt the judge's discussion of the exact number of positions available and the qualifications of the applicants (parts II.B.2 and II.B.3 of the supplemental decision) only to the extent relevant to the appropriate remedy for Behrends and Forkin.

[8] A third alleged discriminatee, Brian Geiger, testified at the hearing in addition to Forkin and Behrends. However, Geiger did not testify as to his availability for employment subsequent to filing his application. Accordingly, we find that Geiger, like the alleged discriminatees who did not testify, is not entitled to an affirmative remedy.

[9] Chairman Battista and Member Schaumber acknowledge that *Dean General* represents current Board law. Nevertheless, they have concerns as to whether that case was correctly decided. Accordingly, they will leave to compliance the issue of how long these applicants, if they had not been discriminated against, would have remained employees of the Respondent. The resolution of this issue will determine the amount of backpay and whether instatement continues to be appropriate. See *Cheney Construction, Inc.*, 344 NLRB No. 9 fn. 2 (2005); *Quantum Electric, Inc.*, 341 NLRB No. 146 fn. 2 (2004).

[10] Chairman Battista does not agree that passing the test is left to the subjective judgment of the Respondent. The weld test was adminis-

must pass the test in compliance to fully demonstrate their qualifications as welders employable by the Respondent.[11]

B. The judge found that a cease-and-desist order for a refusal-to-consider violation under *FES*[12] was appropriate in this case. We do not agree. The judge incorrectly concluded that the Board in its initial Decision and Order had found, as an independent matter, that the Respondent had unlawfully refused to consider prounion applicants for employment, and that the court had affirmed the Board's finding. We find that an independent refusal-to-consider violation under *FES* is beyond the scope of the court's remand.

While the complaint in this case did separately allege a refusal-to-consider violation, the Board's Order did *not* find such a violation.[13] Accordingly, the court was not requested to enforce any remedy in this regard. Indeed, the court viewed the Board as having disclaimed a "refusal to consider" theory as a basis for upholding the only remedy at issue in the case.[14] There is no indication that, in remanding the case to the Board, the court contemplated that the Board might reconsider the complaint allegations and find a new, separate refusal-to-consider violation of the kind set forth in *FES*. Rather, the scope of the court's remand is limited to a requirement that the Board explain its refusal-to-hire remedy. Accordingly, we will not adopt the judge's recommended cease-and-desist order.

Our dissenting colleague contends that because the court did not expressly preclude the Board from ordering a refusal-to-consider remedy, the law of the case does not prevent us from doing so now. This contention fails to acknowledge that the Board's Order in its original decision did not encompass a refusal-to-consider violation, and that the Charging Party did not seek judicial review of the failure to include such a finding. By definition, the Board's cross-application to the court for enforcement of its Order did not include a refusal-to-consider violation.[15] Under these circumstances, therefore, a refusal-to-consider remedy is precluded by the law of the case.[16]

We therefore need not reach the issue of whether such a remedy is barred by the passage of time.

SUPPLEMENTAL ORDER

Supplementing the Board's prior order in this proceeding, as enforced by the United States Court of Appeals for the Seventh Circuit in its judgment filed June 17, 1999, the National Labor Relations Board orders that the Respondent, Starcon, Inc., Manhattan, Illinois, its officers, agents, successors, and assigns, shall

1. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employment to Eugene Forkin and Robert Behrends in positions for which they applied or, if those positions no longer exist, to substantially equivalent positions, in the manner set forth in the remedy section of the judge's supplemental decision.

(b) Make Eugene Forkin and Robert Behrends whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner

tered by a third party testing company. Indeed the Respondent does not even know what the test entails.

[11] Member Schaumber notes that none of the parties specifically argued that the judge's order was improper insofar as it made instatement contingent on the ability of Forkin and Behrends to pass the Respondent's pipe-welding test at compliance, rather than requiring the welders' ability or inability to pass the test be established at the merits phase. Accordingly, Member Schaumber would decline to reach sua sponte the issue of whether a refusal to hire violation can include a conditional instatement remedy.

[12] Under *FES*, to establish a discriminatory refusal to consider violation, the General Counsel bears the burden of showing (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden will shift to the respondent to show that it would not have considered the applicants even in the absence of their union activity or affiliation. 331 NLRB at 15.

[13] See 323 NLRB at 983.

[14] 176 F.3d at 950.

[15] For this reason, our dissenting colleague's assertion that a refusal-to-consider violation should be available here because the Charging Party was not necessarily "aggrieved" by the Board's issuance of its original order is not persuasive. The issue is not whether it was foreseeable that the Charging Party might be harmed by the Board's failure to order a refusal-to-consider remedy in its original order, but, rather, whether a refusal-to-consider violation falls within the strict parameters of the Court's remand to the Board. We find that it does not.

[16] Our colleague argues that because the Board's original decision herein issued before *FES*, the legal distinction and the appropriate remedy for a refusal-to-hire and a refusal-to-consider violation was not yet clear. Thus, she says that "it is hardly clear that the Charging Party was aggrieved by the Board's [original] order and so had a basis to appeal." We disagree. Prior to *FES*, refusal-to-hire and refusal-to-consider violations were separate and distinct violations with separate and distinct remedies. See, e.g., *B E & K Construction Co*., 321 NLRB 561 (1996) enfd. denied 133 F.3d 1372 (11th Cir. 1997). The Board's decision in *FES* simply clarified the elements necessary to establish both violations, the respective burdens of the parties regarding both violations, and the proper stage of the proceeding to litigate certain issues, including remedial issues, relevant to both violations. In the instant case, in which there are more discriminatees than job vacancies, the Charging Party Union knew or should have known at the time of the Board's original decision that, under extant precedent, there was a separate class of discriminatees who were not entitled to a refusal-to-hire remedy but who may have been entitled to a refusal-to-consider remedy. Therefore, the Charging Party was aggrieved by the original Board decision's failure to order a refusal-to-consider remedy and judicial review could have been sought.

set forth in the remedy section of the judge's supplemental decision.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at all of its jobsites and in its office in Manhattan, Illinois, copies of the attached notice marked "Appendix."[17] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of this proceeding, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and to the individuals named in appendix A to the complaint in this proceeding.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 30, 2005

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

I agree with the majority's decision, except for two matters. First, I would not condition the instatement of discriminatees Forkin and Behrends as welders on their passing the Respondent's pipe-welding test. Under *FES*,[1] it was the Respondent's burden to prove that the two could not pass the test, and the Respondent never attempted to do so. Second, I see no obstacle in the Seventh Circuit's opinion to finding that the Respondent violated Section 8(a)(3) by refusing to consider for employment the remaining 105 alleged discriminatees identified by the judge.

1. *FES* requires that the General Counsel prove, among other things, "that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire. . . ."[2] As part of this initial burden, the General Counsel must show that alleged discriminatees meet an employer's job requirements that are based on "nondiscriminatory, objective and quantifiable employment criteria."[3] On the other hand, a job requirement "based on the employer's judgment of skills" is subjective, and therefore the employer's burden to prove.[4]

One of the Respondent's announced qualifications for hire of welders was that applicants pass a 2-inch pipe-welding test. What little is known about the test on this record is that it was under the Respondent's control; a passing grade would inevitably be based on the Respondent's judgment of the applicant's welding skills. Thus, it was not a "quantifiable" criterion to be addressed by the General Counsel. Rather, the test is a "subjective" criterion under *FES*—and the Respondent's burden to prove that an applicant did not meet it.

As the Respondent acknowledges, the record "contains no meaningful evidence concerning what the test entailed."[5] The Respondent therefore confirms that it made no attempt at the hearing to prove that Forkin and Behrends could *not* pass its test. Absent such a showing, the two discriminatees should be deemed fully qualified to be welders for the Respondent, and they should not be required to take the test in compliance before being instated.

2. The Board's initial decision in this proceeding establishes that the Respondent refused even to consider the alleged discriminatees' job applications for discriminatory reasons.[6] In remanding, the court did not ex-

[17] If this Supplemental Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3d Cir. 2002).

[2] 331 NLRB at 12.

[3] Id. at 13.

[4] Id.

[5] Response brief to the General Counsel's exceptions at fn. 5.

[6] The majority argues that the Charging Party did not seek judicial review of the Board's original failure to order a refusal-to-consider remedy and thus that such a remedy is "precluded by the law of the case." But the Board's original decision was issued before *FES* authoritatively clarified the distinction between a refusal-to-hire violation and a refusal-to-consider violation and the appropriate remedy for each.

pressly preclude the Board from ordering a refusal-to-consider remedy. Therefore, the law of the case does not prevent us from remedying these violations now, in a manner consistent with *FES*.[7] Accordingly, unlike my colleagues, I would not find that such a remedy is beyond the scope of the court's remand.

In turn, I disagree with the judge that a refusal-to-consider remedy is inconsistent with the court's opinion concerning the remedial evaluation, at the compliance stage, of instatement rights arising after the unfair labor practice hearing. In broadly restating the legal standards for refusal-to-hire and refusal-to-consider violations in *FES*, the Board took full consideration of the Seventh Circuit's opinion in the present case, and in fact was significantly guided by it.[8]

Finally, the judge erred in finding that the *FES* refusal-to-consider remedy, apart from a cease-and-desist order, is now inappropriate because of the passage of time. It is well-established that the consequences of delay in Board litigation should be borne by the wrongdoer, not the employees who suffered the wrongdoer's discrimination.[9]

Dated, Washington, D.C. June 30, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL, within 14 days from the date of the Board's Order, offer employment to Eugene Forkin and Robert Behrends in positions for which they applied or, if those positions no longer exist, to substantially equivalent positions.

WE WILL make Eugene Forkin and Robert Behrends whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

STARCON, INC.

Paul Hitterman and *Richard Kelliher-Paz, Esqs.,* for the General Counsel.

J. Roy Weathersby and *Mark Keenan Esqs., (Littler, Mendelson, Fastiff, Tichy & Mathiason),* of Atlanta, Georgia, for Respondent.

Michael T. Manley (Blake & Uhlig P.A.), of Kansas City, Kansas, for the Union.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. On June 13, 1997, the Board issued its decision in this case, finding that Respondent violated Section 8(a)(3) and (1) of the Act. *Starcon, Inc.*, 323 NLRB 977 (1997). On May 4, 1999, the United States Court of Appeals for the Seventh Circuit issued its decision enforcing in part and denying enforcement in part of the Board's Order. The court returned the case to the Board for the entry of a new order consistent with the principles laid down in the court's decision. *Starcon, Inc. v. NLRB,* 176 F.3d 948 (1999). On June 7, 2000, the Board issued an order remanding the case to an administrative law judge. The Board accepted the court's opinion as the law of the case. It also instructed that this case be considered in light of *FES (A Division of Thermo Power),* 331 NLRB No. 20 (2000), "including, if necessary, reopening the record to obtain evidence required to decide these issues under the *FES* framework."

On July 6, 2000, Respondent filed a motion for reconsideration of the Board's June 7 Order. Respondent contended that a remand for the purpose of reopening the record was improper under the Court's decision and that the framework set forth in *FES* was not consistent with the law of the case. On October 25, 2000, the Board denied Respondent's motion for reconsideration.

On February 26, 2001, pursuant to my request, the General Counsel filed a motion to further amend the complaint in this case. On March 12, 2001, also pursuant to my request, Respondent filed a response to the General Counsel's motion. Respondent's response, among other things, addressed the alle-

Because the Board had granted a refusal-to-hire remedy, it is hardly clear that the Charging Party was aggrieved by the Board's order and so had a basis to appeal. Under all of the circumstances here, I do not believe that the law of the case doctrine forecloses granting a refusal-to-consider remedy now, following issuance of *FES* and the reversal of most of the refusal-to-hire violations.

[7] The components of the remedy for a refusal-to-consider violation are a cease-and-desist order; an order to place the discriminatees in a position for nondiscriminatory consideration for future job vacancies, and to consider them accordingly; and an order to notify the Regional Director, the discriminatees, and the charging party of such future vacancies. Questions of instatement and backpay concerning these posthearing vacancies are left to compliance. *FES*, supra at 15.

[8] Id. at 10–11, 14.

[9] *NLRB v. J. H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 264–265 (1969); *Yorkaire, Inc.*, 328 NLRB 286, 287 (1999), enfd. 251 F.3d 154 (3d Cir. 2000).

gations made by the General Counsel in the motion to amend.[1] On March 20, 2001, I granted the General Counsel's motion and gave the parties until April 3, 2001, to notify me if they wished to present additional evidence in this proceeding. No party has expressed a desire to submit additional evidence.

On the entire record[2] and after considering the briefs filed by the General Counsel, Respondent, and the Union I make the following

FINDINGS OF FACT

I. THE PRIOR PROCEEDINGS

A. The Board Decision

Respondent performs maintenance and repair work on petrochemical refineries. It has a complement of employees that it uses throughout the year. Some of the work that Respondent performs is "turnaround" work. This occurs when a refinery shuts down for a period of time while repair work is done. Turnaround work is done 24 hours a day and Respondent's need for employees rises dramatically as a consequence. These additional employees are hired on a temporary basis.[3]

On June 13, 1997, the Board adopted the decision of Administrative Law Judge Robert T. Wallace. By doing so the Board concluded that Respondent violated Section 8(a)(3) by refusing to hire and consider for hire 80 applicants who submitted their applications by mail and at least 32 applicants who personally submitted their applications. The Board found that Respondent had hired 18 permanent employees during the time in question. The Board concluded that Respondent also violated Section 8(a)(3) by subcontracting work to another employer, B E & K, to avoid hiring union members; it concluded that Respondent used an unspecified number of B E & K's employees to perform turnaround work for Uno-Ven, a customer of Respondent. To remedy the violations, the Board ordered that Respondent consider for hire all the union job applicants and hire them all. Respondent was ordered to make all the discriminatees whole for lost wages and benefits. Importantly, the Board ordered that:

> Questions concerning the number of jobs (regular and temporary) that would have been available during the period of discriminatory conduct and use of remedial preferential hire lists are reserved for determination in the compliance phase of this proceeding. [Footnote omitted.] [323 NLRB at 983.]

The Board also concluded that Respondent violated Section 8(a)(3) by changing its application and hiring policies to avoid hiring union supporters.[4] No affirmative relief was ordered for this violation.

B. The Court's Decision

The court affirmed the Board's conclusions that Respondent had violated the Act. However, the court disagreed with the Board's conclusion that Respondent was required to hire and pay backpay to all the discriminatees where there were not enough job openings for all of them. The court concluded that this matter could not be postponed for resolution in compliance proceedings because the fact that there were fewer openings than applicants was a defense to the allegations that Respondent had failed to hire all of the applicants. The court held:

> If [the] . . . Board wants to order relief to particular "salters," [it has,] at a minimum, [to] determine how many of them [Respondent] would have hired had it not been actuated by hostility to unionization. [176 F.3d 948.]

The court returned the case to the Board for the entry of a new order consistent with the principles set forth in its opinion.

C. The FES Decision

On May 11, 2000, after the court's opinion in this case, the Board issued its decision in *FES.* In that case the Board directly addressed the concerns raised by the court in this case as well as by other courts of appeals. The Board revised the standards it uses in cases such as this case, involving allegations of refusal to hire applicants and refusal to consider them for hire. The Board held that to establish a violation in these cases the General Counsel must show: (1) that the respondent was hiring, or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the respondent has not adhered uniformly to such announced requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden then shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity. The Board held that it was the respondent's burden to show that an applicant did not meet its specific criteria for the position, was otherwise unqualified for the position, or was not as qualified as those who were hired.

Importantly, the Board indicated its agreement with the approach taken by the court in this case. Thus, the Board concluded that it is the General Counsel's burden to show at the hearing on the merits the number of openings that were available. The Board left for compliance proceedings the issue of

---

[1] As Respondent accurately points out in the response, I had earlier conducted a conference call with the parties for the purpose of determining whether to schedule a new evidentiary hearing. Although all parties disclaimed the need for such a hearing, I concluded that to assure that all parties made fully informed decisions as to whether they desired to present additional evidence I would require the General Counsel to file an amended complaint to conform with the Board's remand order and require that Respondent file an answer.

[2] GC Exhs. 40 through 56, which are the formal papers, are received in evidence.

[3] The facts in this case have been set forth extensively in prior decisions. They will be repeated here only to the extent necessary to resolve pending issues.

[4] The Board also found that Respondent violated Sec. 8(a)(1) by creating the impression that an employee's union activity would be kept under surveillance, threatening employees that union members would not be hired, and that it would subcontract work to avoid hiring union members, and violated Sec. 8(a)(3) by issuing written warnings to two employees and suspending one of those employees. These findings are not at issue in this proceeding.

which particular discriminatees were entitled to be hired and receive backpay.

II. REFUSAL TO HIRE ALLEGATIONS

A. Background

As previously indicated, on February 26, 2001, the General Counsel amended the complaint. The amendment alleges that in April and continuing through May 1994,[5] Respondent solicited applicants for welding, mechanic, and laborer positions by distributing leaflets and placing advertisements. It alleges that the requirements for hire set forth in the leaflets and advertisements were not uniformly adhered to by Respondent and were pretextual and used as a pretext for discrimination. The amendment further alleges that on June 22, the Union submitted 80 job applications to Respondent and thereafter 30 more persons applied for the positions with Respondent. The amendment alleges that all these applicants met Respondent's generally stated requirements for the positions that it was seeking to fill and that they were available for employment "at all times material." The amendment further alleges that between July 4 and September 30, Respondent hired 27 (sic) employees and hired additional employees to work on specified projects from July 17 to December 4.

On March 12, 2001, Respondent filed an answer to the amendment that denied the essential allegations in the amendment. The answer also pled a number of affirmative defenses.[6]

B. Analysis

1. Number of discriminatees

I find it necessary to first identify more precisely the number of discriminatees. Judge Wallace ordered Respondent to offer employment to the 111 persons listed on Appendix A to the complaint. That list included the name of Joe Nelson, but I have been unable to locate an application with that name, and the General Counsel now contends that the number of applicants is 110. I shall therefore not count him as a discriminatee. The parties agree that on June 22, 80 identified applications for employment were made, but they disagree as to the numbers that were made thereafter. On July 19, Robert Behrends and Kenneth Lusk applied for work, bringing the total to 82. On July 25, 28 employees applied for work at Respondent's facility. That same day Brian Geiger and Matt Grammer applied for work with Respondent at another facility bringing the total to 112 applicants. These numbers are consistent with those found by Judge Wallace.[7] The court in its opinion and the Board in its remand order refer to 80 applicants; as set forth above that number is obviously an inadvertent error.

However, these numbers include Michael Eugene Forkin who applied twice—on June 22 and July 25. They also include Wayne Darby, who applied on July 25. Respondent called him on July 27 and hired him the next day with knowledge of his union activities. The General Counsel concedes that Darby should not be in the pool of discriminatees entitled consideration for instatement and backpay. This reduces the number to 110, as alleged by the General Counsel.

The numbers also include Robert Lieske, Ernest Grossman, and Donald Lieske. They also applied on July 25. On July 27, Respondent offered Robert Lieske a position, but he declined because he had obtained another job. Respondent attempted to offer Grossman a position, but Grossman did not respond to a voice mail message. Respondent intended to offer Donald Lieske a position on July 27 also, but he did not respond to three telephone calls made to him. Although, as more fully discussed below, the General Counsel has established that Respondent hired a substantial number of employees for the week ending July 31 and thereafter, the General Counsel has not shown that Respondent would have considered these three alleged discriminatees again for employment under circumstances where they already had refused or otherwise rebuffed Respondent's effort to hire them and where they gave no indication of a desire to be considered again for future vacancies. I conclude that the General Counsel has failed to show that Respondent unlawfully failed to hire these three employees. This result is consistent with the position taken by the General Counsel regarding Wayne Darby, who also was offered employment. Thus, the number of discriminatees entitled to consideration for instatement and backpay is 107.

2. Number of positions available

Both the court opinion and *FES* require that I determine the number of positions that were available for the discriminatees. The record shows that from July 4 through September 30, Respondent hired one full-time laborer on July 19; two on July 28 and August 9; and two on August 11 for a total of six.[8] During that same time period Respondent hired full-time welders on July 4, 21, and 29, August 3 and 9, for a total of five. Respondent also hired three full-time mechanics on July 25, and one on August 5, and 23, and September 8, for a total of six. Respondent thus hired 17 full-time employees during that time period.

---

[5] All dates are in 1994 unless otherwise indicated.

[6] Respondent also argues that the General Counsel's amendment is improper under Secs. 102.15 and 102.17 of the Board's Rules and Regulations. This argument is frivolous. Those rules specifically provide that the judge designated to conduct the hearing may, upon motion by the General Counsel, allow an amendment to the complaint. Because this case has been reopened, I have authority to allow amendments to the complaint.

[7] *Starcon*, supra, at 978 (80 applicants), 979 (Behrens and Lusk and about 30 applicants on July 25), and 982 (at least 32 applicants between July 19 and 27 (sic)). Judge Wallace later refers to "39" applicants who applied between July 19 and 25 and then later makes reference to "37" who made application during that time period. I conclude that these latter references are inadvertent errors.

[8] As previously indicated, Respondent also hired Wayne Darby as a laborer on August 1. As more fully described in Judge Wallace's decision, Respondent hired Darby with knowledge of his support for the Union. The General Counsel concedes that Darby's position should not be counted as available for the discriminatees. On July 29, Respondent hired Millard Howell as a welder. Judge Wallace concluded that Howell was thereafter subjected to unlawful discipline. However, Respondent was unaware of Howell's union sentiments at the time he was hired. I conclude that Respondent hired Howell as part of its unlawful scheme to avoid hiring known union adherents and that Howell's position should therefore be counted as available for the discriminatees.

Beginning the week ending July 17 through December 4, Respondent used a number of temporary employees on three projects. The number of temporary employees working on the Uno-Ven project peaked at 39 for the week ending August 7. The number of employees working on the Mobil project peaked at 16 for the week ending October 2. Finally, four employees worked on the Marathon project for the week ending December 4. All of these employees were hired as welders or mechanics. I conclude that a total of 59 temporary positions were available during this time period.

Citing *Eckert Fire Protection*, 332 NLRB No. 18 (2000), Respondent argues that the number of positions for which it would have considered the discriminatees is reduced because it would not have considered the applications active after certain time periods. The application forms completed by the first set of 80 discriminatees read:

> This application for employment shall be considered active for a period of time not to exceed 45 days. Any applicant wishing to be considered for employment beyond this time period should inquire as to whether or not applications are being accepted at that time [GC Exh. 15].

Thereafter, Respondent used a revised application form that contained this identical language, except that the time limit was increased to 60 days. In addressing the General Counsel's burden for a refusal to consider violation in subsequent compliance proceedings the Board in *FES* stated:

> Since the General Counsel is seeking to prove only the consequence of the refusal-to-consider violation—not a new discrimination violation—proof of animus is not part of his case in compliance. However, because there has not been a showing in the hearing on the merits with respect to the hiring decision on the subsequent job opening . . . the General Counsel must prove that the discriminatees actually would have been selected . . . and that entails, at a minimum, *showing that the applications filed at the time discriminatees applied would still be regarded as active when the openings occurred* . . . . [Emphasis added.] [*FES*, id., slip op. at 7 fn. 18.]

It seems that this same standard should also apply to the hearing on the merits.

In reference to this issue, Judge Wallace found that an agent of Respondent testified that Respondent had followed a strategy of building up a reserve of applications for long-term hiring needs and that prior to the receipt of the 80 applications on June 27 Respondent had informal application procedures designed to produce a backlog of applications as a hedge against unforeseen needs. In other words, Judge Wallace concluded that the General Counsel had established that Respondent did not adhere to the 45–day time limit indicated on the application forms. Judge Wallace also concluded that the changes that Respondent made thereafter in its hiring procedures were unlawful. The Board and court affirmed these conclusions. It is thus clear that Respondent's argument has been previously considered and rejected and may not now be relitigated.

3. Qualifications of the applicants

FES holds that it is the General Counsel's burden to show that the applicants had the experience or training relevant to the announced or generally known requirements of the available positions. This holding is entirely consistent with the court's opinion. The General Counsel may also show that the requirements themselves were prextextual or not uniformly followed. The General Counsel makes that argument in this case, pointing to evidence that Respondent's agent, Bentley Hatteberg, told an applicant that the hiring process was all just a bunch of red tape. This statement is too general to show that the announced *requirements* for the positions were either not followed or were pretextual. The General Counsel also points to a statement made by another agent to the same applicant that the only way to get a job with Respondent was to get a recommendation from the supervisor because Respondent was concerned about the union supporters who had been applying for work. This statement may show animus, but it fails to show that the announced requirements for the positions were pretexts. I conclude that the General Counsel has failed to show that the requirements for the positions were either not followed or were pretextual.

Under these circumstances, *FES* requires that the General Counsel show that the applicants had the experience or training for the announced or generally known requirements for the available positions. The General Counsel's burden in this regard is limited to showing that the applicants met the objective and quantifiable facial requirements for the positions. It is Respondent's burden to show that the applicants failed to satisfy any subjective, nonquantifiable requirements for the positions.

As more fully described in Judge Wallace's decision, Respondent advertised for the positions of welder, mechanic, and laborer. Welders were required to pass a 2-inch pipe-welding test administered by a third party on Respondent's behalf. None of the discriminatees were allowed the opportunity to take the test as a result of Respondent's unlawful refusal to consider them for employment. Respondent also indicated that prior pipeline or petro-chemical experience "is helpful" for the welder's position. Respondent indicated that mechanics "[m]ust have a working knowledge of piping, heat exchangers, aboveground tanks, and refinery turnarounds." Respondent wanted laborers to be "[a]ny hard-working individual ready and willing to learn how to work in the petro-chemical industry . . . ." [323 NLRB at 978.]

The General Counsel argues that the requirements for these positions contain no objective criteria and therefore he bears no burden of showing that the applicants met those requirements. Instead, argues the General Counsel, Respondent bears the burden of showing that the applicants did not meet those requirements. I disagree. I conclude that the requirements contain both objective and subjective elements.

Turning first to the welder position, I conclude that the General Counsel bears the burden of showing that the discriminatees had the experience or training to perform welding work in general. To hold otherwise would mean that the General Counsel's burden is simply to show that the alleged discriminatee applied for the position regardless of whether or not, for example, the alleged discriminatee has spent her entire working ca-

reer as a singer or diplomat (or was a penguin, to use Judge Posner's description) without any experience or training as a welder. I do not read *FES* as placing such an empty burden on the General Counsel. Moreover, the General Counsel's argument is inconsistent with the rationale of *FES* that the burden of establishing the qualifications of the applicants is placed on the party with the superior knowledge of those qualifications—here the discriminatees and the General Counsel. It would also place an unreasonable burden on Respondent.

The statement in the advertisements that prior pipeline or petro-chemical experience "is helpful" is nonquantifiable and therefore it is properly Respondent's burden to show the applicants lacked the experience resulting from the prior pipeline or petro-chemical work. The requirement that the welders pass a 2-inch pipe-welding test requires more analysis. On the one hand, the test appears to be an objective one; as such under *FES* it would be the General Counsel's burden to show that the applicants could pass the test. The problem, however, is that one cannot be sure that the applicants would have passed the test until after it was given. And it was Respondent's unlawful refusal to consider the applicants for employment that prevented them from demonstrating that they could pass the test. Under these circumstances, I conclude that Respondent should be permitted to administer the same pipe-welding test to those discriminatees qualified to fill welder position and be required to hire those applicants only if they pass that test.

Turning next to the mechanic position, Respondent advertised that mechanics must have a working knowledge of piping, heat exchangers, above-ground tanks, and refinery turnarounds. This too has both objective and subjective components. It is clear that Respondent sought not just mechanics in general, but mechanics that had knowledge in the areas listed above. This is objective and therefore is the General Counsel's burden. I thus again reject the General Counsel's argument that the stated qualifications for this position are entirely subjective. Whether the knowledge was sufficient to constitute "working knowledge" is subjective. It, therefore, is Respondent's burden to show that the knowledge possessed by the applicants in piping, heat exchangers, above-ground tanks, and refinery turnarounds did not amount to "working" knowledge.

The qualifications for the laborer's position are only that the applicants are able to engage in physical labor. The General Counsel's burden is to show that applicants can do so in general. Respondent's burden then is to show that the individual applicant lacks the ability to perform the specific laborer tasks.

Having allocated the burdens, I turn now to examine the qualifications of the applicants. The General Counsel argues that all applicants were qualified for all three positions. He bases this on the information contained in the discriminatees' application forms. Respondent objects and argues that the statements made in the application forms constitute hearsay and thus may not be considered for the truth of the matters asserted. Respondent is indeed correct that the applications contain hearsay statements. But this misses the point, which is that it was Respondent's practice to consider the applications, notwithstanding their hearsay nature, in making its hiring decisions. Respondent also argues that the General Counsel cannot meet its burden on this issue without calling each discriminatee as a witness. I reject this contention also. The General Counsel may meet his burden using whatever type of admissible evidence he deems appropriate. In a similar vein, Respondent argues that it has been deprived of due process because it was unable to cross-examine the applicants. Here again, however, the point is that Respondent itself relied on the application forms. The General Counsel was not required to call the applicants and thus Respondent was not deprived of any opportunity to cross-examine them.

Turning to the mechanics position, I have indicated that the General Counsel must show that the applicants had the knowledge and experience to perform mechanic's work and had some knowledge in the areas of piping, heat exchangers, above-ground tanks, and refinery turnarounds. The General Counsel does not attempt to identify which of the applicants meet this requirement. Instead, he rests solely on his contention that it is not his burden to do so. Respondent and the Union, however, agree that the applications of the following 16 discriminatees indicated some knowledge of the areas described above: Bernard Sturmer, John Burns, Paul Gurgone, Vincent Urso, Thomas Feeney, Ronald Gould, Philip Ljubicich, William Feeney, Eugene Forkin, Phillip Perkins, W. Zitoun, Philip Davidson, J. Ruby, Jerry Davis, Roger Jensen, and August Tribbett. Based upon my review of their applications, I agree. Respondent concedes that applications of two other discriminatees indicated such knowledge. Kevin Kavanaugh's application indicates that he worked for Clark Oil, and Dolye Sawyer's application shows that he had experience in oil tank work. I agree with Respondent's concession. The Union argues that the applications of four other discriminatees show the requisite knowledge. The applications of Alton Sanders, James Bragan, and Scott Gould show that they had experience in refineries; I agree with the Union that these three discriminatees have demonstrated the requisite knowledge. The Union also argues that the application of Raymond Lewis demonstrates the necessary knowledge. I disagree and will not count him. My examination of the applications shows that Christopher Preble and James Chavez had knowledge of exchange repairs, Jerry Litherland, Patrick Polick, and Richard Passini had knowledge of tank repair work. I conclude that these applications demonstrated some knowledge in the requisite areas. In sum, the evidence shows that 26 discriminatees met the stated, objective qualifications for the mechanic position.

I turn now to examine whether Respondent has shown that these 26 discriminatees failed to meet the subjective qualifications for the position or that the persons it actually hired had superior qualifications. In this regard, Respondent argues that only two of the discriminatees indicated that they had experience in "refinery turnarounds." This argument must be based on the notion that Respondent required mechanic applicants to have some knowledge in each of the areas specified in the position announcement. But I find no evidence to support that notion and I therefore reject it. Respondent also complains that because the General Counsel never identified which of the discriminatees for whom he was seeking an instatement and backpay remedy it would be required to guess their identities and positions in order to prove their lack of qualifications. That indeed appears to be the case. But that the burden allocated to

Respondent under *FES.* Respondent does not otherwise argue that the applicants were unqualified. Accordingly, I find that there were 26 discriminatees qualified to fill the mechanic positions that became available.

Turning now to the qualifications of the discriminatees to fill the welder positions, I have concluded above that the General Counsel must show that they had the experience or training to perform welding work in general. I have examined each of the applications and conclude that they show that each of the discriminatees possessed the knowledge or training to perform welding work.[9]

I turn to examine whether Respondent has shown that it would not have hired these discriminatees because they failed to meet the subjective requirements of the welding position. Respondent argues that it needed only a particular type of welder—A welders and B welders. In doing so Respondent relies on testimony that was not relied on by Judge Wallace. Judge Wallace explicitly described the qualifications that Respondent set for this position, but he makes no mention of the additional qualifications that Respondent now seeks to add to those listed on the published announcements. I conclude that Judge Wallace necessarily rejected that testimony. To the extent that I am required to make a credibility determination on this matter, I would also reject this testimony because it is inconsistent with the qualifications Respondent published on at least two occasions. It stands out as something contrived after the fact. Finally, even assuming that Respondent was seeking only A and B welders, Respondent has failed in its burden of showing which of the discriminatees lacked the skills or training to perform the work of A or B welders. For all these reasons I reject Respondent's argument. Respondent also argues that it required that welders have some prior petrochemical experience. I reject that argument too; the published qualifications indicated only that such experience would be "helpful." Again Respondent has failed to meet its burden of showing which of the welder applicants lacked the skills or training necessary to perform the work.

Finally, I address the qualifications of the discriminatees for the laborer's position. The General Counsel must show that the discriminatees have the ability, in general, to perform physical labor. Based upon my review of the applications, I conclude that he has done so. All the discriminatees have past experience performing physical work. Respondent has failed to show that these discriminatees are unable to perform the specific task demanded of its laborers. I therefore conclude that all of the discriminatees are qualified to fill the position of laborer.

[9] I have concluded above that Donald Lieske is not a discriminatee. He should not be considered for this position for another reason. Donald Lieske's application shows that he worked as a laborer or helper at "D-Con Morrison" for a period of about 9 months. It provides no more work history. When asked to describe any specialized training, apprenticeship, skills, job related training, or job related activities, Lieske wrote "All shop classes." I conclude that the General Counsel has failed to show that Donald Lieske had the experience or training to perform welding work.

4. Availability of the applicants

Respondent concedes that under the Board and court order, discriminatees Eugene Forkin and Robert Behrens may be awarded instatement and backpay; they were the only discriminatees to testify at the trial. Respondent argues that none of the other discriminatees are eligible for such a remedy because the General Counsel has not established that those discriminatees were available for the positions that became open after they had applied. Respondent also argues that the General Counsel has also failed to show that that the discriminatees would have accepted employment had it been offered. In *FES*, the Board, in the context of addressing the remedy for a refusal to consider violation, stated "[T]he General Counsel must prove that the discriminatees actually would have been selected for the opening in questions." *FES,* id., slip op. at 7 fn. 18. It seems to follow that if it were shown that the applicants were unavailable to accept employment or would have declined employment had the offer been made, they would *not* have been selected for the opening in question.

I first consider whether this issue must be addressed as part of the merits or whether it can be deferred to the compliance proceeding. If it is shown that a discriminatee was unavailable to accept employment at the time she should have been offered the position, it seems that there has been no unlawful refusal to hire on that occasion. Likewise, if shown that the discriminatee would not have accepted the offer in any event had it been extended, again there is no unlawful refusal to hire. These are issues going to the merits of the case, and the thrust of both the court's opinion and *FES* is that issues going to the merits may not be deferred to the compliance stage. This conclusion is buttressed by the court's statement:

> The worker might have gotten a higher paying job and thus have no interest in being reinstated and have suffered no loss from the discrimination. There would be no basis for ordering reinstatement and backpay in such a case but the Board would still be entitled to enter a cease and desist order to provide some assurance against a repetition of the violation. [176 F. 3d at 951.]

In context, I understand this to mean that the Board is precluded from finding a refusal-to-hire violation, or award a refusal to hire remedy, unless it is shown that the discriminatee was available and would have accepted the offer if made, but that the Board could still enter a cease and desist order if there had been a refusal to consider violation. This is the law of the case and must be honored. I therefore conclude that this issue must be addressed now and cannot be deferred.

I next turn to the issue of whether it is the General Counsel's burden to show the applicants remained willing and available to accept the offer of employment or whether it is Respondent's burden to show the lack thereof. Under the facts of this case Respondent has violated the Act by refusing to consider the discriminatees for hire; it is the wrongdoer. This fact might trigger the maxim that doubts and ambiguities should be resolved against it because it was Respondent's unlawful conduct that caused the uncertainty. But the Board in *FES,* again in the context of the remedy for a refusal to consider violation, stated:

> [B]ecause there has been no showing in the hearing on the merits with respect to the hiring decision on the subsequent job opening, issues related to the hiring decision cannot be resolved against respondent as an adjudicated wrongdoer.

FES, id., slip op. at 7 fn. 18. The Board has thereby rejected the application of that maxim under these circumstances. As shown above, this matter goes to the merits of the violations, at least in this case. The General Counsel generally bears the burden on such matters. Also, the Board considers which party has easier access to the relevant information in assessing on whom to place a burden. In this instance, it is the General Counsel who has the knowledge in the first instance of whether the discriminatees remained willing and able to accept employment during the time after they made application. A respondent would have little access to this information and, because the Board does not allow discovery, a respondent would likely have to call all the alleged discriminatees as witnesses in order to question them about these issues. This would unnecessarily prolong and delay cases such as this. Finally, as pointed out above, in the amended complaint, the General Counsel himself accepts this burden by alleging that the discriminatees were available for work at all material times. Under these circumstances I conclude that the General Counsel must show that the discriminatees remained willing and available to accept the positions he contends should have been offered to them.

Respondent argues that the General Counsel can only meet this burden by presenting the testimony of all the discriminatees. This argument lacks merit. The General Counsel may meet this burden in any number of ways that do not include calling the applicants to testify. It is for the General Counsel to decide how best to meet his burden. In support of its argument, Respondent cites *B E & K Construction Co.*, 321 NLRB 561, 570 fn. 31. That case is not on point. There, the judge concluded that the applications at issue were not properly authenticated. Here, both the Board and the court have concluded that the applications were properly received into evidence. Respondent also cites *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 177-178 (1965). However, that case involved a compliance proceeding. It has not been applied to cases on the merits.

Finally, I consider whether it can be presumed that because the discriminatees made application they remained available and willing to accept employment throughout the relevant period. I find such a presumption cannot be supported on the record in this case, I note that Respondent is in the construction industry where employees often move quickly to other jobs. I note that in this case the discriminatees had a history of working in higher paying union jobs. That does not mean, of course, that they would not have accepted a lower paying job if they remained out of work. But it does call in question their availability if they, in the interim, found work in a longer duration project at the higher union wage level. Indeed, the facts in this case undermine such a presumption. It will be recalled that a group of the discriminatees made application on July 25, and 2 days later Respondent began contacting four of the applicants. In that short period of time one discriminatee found other work and declined Respondent's offer and two others displayed their unavailability to accept the offer by failing to return Respondent's calls. It should be kept in mind that the General Counsel seeks reinstatement and backpay for openings that occurred almost 6 months after the discriminatees completed their application. I conclude it cannot be presumed that, from the mere act of application, applicants remain willing and available to accept employment indefinitely. Because the General Counsel has not otherwise shown that the discriminatees remained willing and available to accept employment with Respondent for openings that occurred I shall dismiss the refusal to hire allegations in the complaint, excluding Forkin and Behrens.

5. Refusal to consider allegations

As indicated above, the Board concluded and the court affirmed that Respondent has unlawfully failed to consider the discriminatees for employment. The Board did not order a remedy specifically designed to address the refusal to consider violation. The court indicated that the Board was entitled to at least a cease-and-desist order. The Board remanded this case for consideration in light of *FES*. In that case the Board held that the proper remedy for a refusal to consider the case includes not only a cease-and-desist order, but also an order to place the discriminatees in the position they would have been in, absent discrimination, for consideration for future openings and to consider them for the openings in a nondiscriminatory manner. The remedy would also include an order to notify the discriminatees, the Charging Party, and the Regional Director of future openings in positions for which they applied or substantially equivalent positions. The Board leaves to the compliance proceeding the identification of those discriminatees entitled to instatement and backpay.

The General Counsel's brief offers no position on what remedy, if any, he seeks for the refusal to consider violations. The Union, however, argues that the remedies described in *FES* should be applied. Respondent, however, argues that those remedies are inconsistent with the court's opinion. In particular, Respondent disputes the validity of a Board order that would leave to compliance the entire issue of whether there had been unlawful refusals to hire occurring after the hearing on the merits. I agree.

The Board explained that in the compliance proceeding for a refusal to consider the case the General Counsel would have the burden of establishing the general qualifications of the applicants. This is identical to the burden the General Counsel has on the merits. If established, the burden would shift to the respondent to show that it would not have hired the discriminatees. This too is a respondent's burden on the merits. In this regard, the compliance proceeding very much resembles the hearing on the merits. The compliance proceeding contemplated by the Board appears very similar to the one it had applied earlier in refusal to hire cases and that was criticized by the court. This appears to be a matter that the court held deals with the issue of liability, a matter "the Board can't shove off to the compliance stage of the proceeding." *Starcon*, id. at 951. Under the law of this case, such a remedy may not be entered here. The other aspects of the Board's remedy for a refusal to consider the case are not in conflict with the court's opinion. However, it is now nearly 7 years since the unlawful conduct

transpired and those remedies are impracticable as a result of that passage of time.

AMENDED REMEDY

The first sentence in the second paragraph in the remedy section of the decision is deleted. In its place will be substituted: Among other things, Respondent will be ordered to consider for employment and hire Eugene Forkin and Robert Behrens for which they applied, except that before they are hired for the welding position they must pass the 2-inch welding test that Respondent administered to other welders, and Respondent shall make Forkins and Behrens whole, with interest, for any loss of earnings and other benefits suffered as a result of the discrimination practiced against them. Issues outlined in *Dean General Contractors*, 285 NLRB 573 (1987), will be left for resolution in the compliance stage of this proceeding.

AMENDED ORDER

1. The following will be added after paragraph 1(e) of the Order:

(f) Refusing to consider applicants for employment because they support the Union or any other labor organization.

Paragraph 1(f) in the original order will be relettered (g).

2. The language in paragraph 2(a) of the order is deleted and the following is substituted: Offer immediate employment to Eugene Forkin and Robert Behrens to positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for the loss of earnings and benefits suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

AMENDED NOTICE

1. The following will be added to the "WE WILL NOT" portion of the notice: WE WILL NOT refuse to consider applicants for employment because they support the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL–CIO, or any other labor organization.

2. The first paragraph in the "WE WILL" portion of the notice is deleted and the following substituted: WE WILL offer immediate employment to Eugene Forkin and Robert Behrens to positions for which they applied or, if nonexistent, to substantially equivalent positions, and make them whole, with interest, for the loss of earnings and benefits suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of this decision.

STARCON, INC.